91-1005

Supreme Court, U.S.
FILED
DEC 20 1991
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No.

In the
Supreme Court of the United States

October Term, 1991

ARDELL KIDWELL
and
R. DAVID MASCIOLA,

PETITIONERS,

v.

WAKEFIELD PROPERTIES, INC.,
and
INDIANHEAD SKI CORPORATION,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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I

Questions Presented For Review

Have the rulings of this Court in *Matsushita Electric Industrial Co v Zenith Radio Corp*, 475 US 574, 106 SCt 1348, 89 LEd2d 538 (1986), *Anderson v Liberty Lobby, Inc.*, 477 US 242, 106 SCt 2505, 91 LEd2d 202 (1986), and *Celotex v Catrett*, 477 US 317, 106 SCt 2548, 91 LEd2d 265 (1986) removed the right to jury determination of material factual disputes when defendants, for whom summary judgment was ordered by the district court, would bear the burden of proof on those issues at trial?

May the district court, *sua sponte*, and without notice to plaintiffs that the issue would be decided by the court, render summary judgment for defendants on an affirmative defense on which defendant would bear the burden of proof at trial, when defendants have not attempted to establish the absence of genuine issues of material facts on the issue which is the basis of the affirmative defense and the district court needs to make determinations of facts to support its order of summary judgment? [1]

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[1] The parties below are reflected in the caption: Ardell Kidwell, R. David Maciola, Wakefield Properties, Inc. and Indianhead Ski Corporation. At the commencement of these actions in the district court by respondents, two additional parties were named as defendants because it was believed that they had ownership interests in the land occupied by the Indianhead Ski area; Ronald E. Vincent and Indianhead Mountain Resort. Indianhead Mountain Resort was never served with process and it was determined that these parties did not have any ownership interest in the land of the ski area or in its operation. Both Ronald E. Vincent and Indianhead Mountain Resort were dismissed as defendants by Stipulation and Order of the district court on July 20, 1990. Those parties have no further interest in these proceedings.

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WAKEFIELD PROPERTIES, INC.,
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RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Ardell Kidwell and R. David Masciola, the petitioners herein, pray that a writ of certiorari issue to review the judgment of the Sixth Circuit Court of Appeals entered in the above-entitled case on October 16, 1991.

OPINIONS BELOW

The September 20, 1990 opinion of the United States District Court for the Western District of Michigan, Northern Division is unreported and is printed in Appendix A, infra, at Page A-1. The October 16, 1991 opinion of the United States Court of Appeals for the Sixth Circuit is unreported and is printed in Appendix A, infra, at Page A-24.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered October 16, 1991. This Petition for Certiorari was filed within ninety days from that date. Jurisdiction of this Court is invoked pursuant to 28 USC 1254(1). Jurisdiction of the District Court was invoked pursuant to 28 USC 1332(1).

STATUTE INVOLVED

Relevant portion of the Michigan Ski Area Safety Act of 1962 (Michigan Compiled Laws 408.321 et seq.)

"MCL 408.342. Ski areas; conduct of Skiers; acceptance of risks

Sec. 22. (1) While in a ski area, each skier shall do all of the following:

(a) Maintain reasonable control of his or her speed and course at all times.

(b) Stay clear of snow-grooming vehicles and equipment in the ski area.

(c) Heed all posted signs and warnings.

(d) Ski only in ski areas which are marked as open for skiing on the trail board described in section 6a(e).

(2) Each person who participates in the sport of skiing accepts the dangers that inhere in that sport insofar as the dangers are obvious and necessary. Those dangers include, but are not limited to, injuries which can result from variations in terrain; surface or subsurface snow or ice conditions; bare spots; rocks, trees, and other forms of natural growth or debris; collisions with ski lift towers and their components, with other skiers, or with properly marked or plainly visible snow-making or snow-grooming equipment."

STATEMENT OF THE CASE

A. *The Facts*

Each of the petitioners received serious personal injuries under virtually the same circumstances and at almost the same time. The injuries occurred at the end of an alpine downhill ski race held at Indianhead Ski Area in Gogebic County, Michigan on March 16, 1986. Specifically, each petitioner was injured by colliding with the same fixed, solid telephone pole located at one end of the finish line of the downhill race. Respondents are the owners and operators of the Indianhead Ski Area.

Petitioners, both residents of Illinois, filed diversity actions in the Western District of Michigan, asserting liability against respondents under both premises liability and general negligence theories. Respondents answered, and asserted Affirmative Defenses; including immunity under the Michigan Ski Area Safety Act and release defenses based on several documents. The cases were consolidated for trial by the district court.

Discovery was had of the petitioners, representatives of respondents and several experts disclosed by each side. Respondents then filed motions for summary disposition under Rule 56, setting forth as their grounds an absence of any material issues of fact with regard to the documents claimed as releases or waivers.

The issues raised by respondents in their motions were extensively briefed by both sides, and the motions were noticed for oral argument before the district court on September 20, 1990. The Michigan Ski Area Safety Act had not been raised by respondents

as a ground for their Rule 56 motions, even though the Act was mentioned in respondents' brief as support for the proposition that certain of the alleged releases or waivers asserted by respondents as defenses would not be violative of public policy in Michigan.

B. *Proceedings Below*

Following oral arguments by counsel for both sides, the district judge rendered his opinion from the bench. He began by denying respondents' motions on the grounds raised in the motions, finding that genuine issues of fact existed with respect to the claimed releases or waivers of liability. The district judge then went on, *sua sponte*, to "grant" respondents' "motion" on the basis of the Michigan Ski Area Safety Act, finding as a matter of law that the Michigan Ski Area Safety Act prevented petitioners from recovery.

Timely appeals from the district court's orders were taken to the United States Court of Appeals for the Sixth Circuit by petitioners. Respondents cross-appealed the district court's denial of their summary judgment motions on the grounds raised in those motions. The issues raised by petitioners in their consolidated appeal were:

> "1. Is the defendants' affirmative defense based on the provisions of the Michigan Ski Area Safety Act an issue on which the defendants have the burden of proof at trial?
> 2. Does the Michigan Ski Area Safety Act provide a statutory "primary" assumption of risk defense for a ski area operator such that the issue of negligent conduct on the part of said ski area operator is irrelevant?
> 3. As a matter of law, was the danger of injury from collision with the solid wooden poles on either end of the finish line of the downhill race a danger inherent to the sport of skiing and both obvious and necessary?

4. Did the District Court err in granting summary judgment for defendants based on the Michigan Ski Area Safety Act when that decision necessitated a factual finding that the danger causing plaintiffs' injuries was inherent to the sport of skiing, obvious and necessary?"

PLAINTIFFS' BRIEF ON APPEAL, page 1

Petitioners' BRIEF ON APPEAL dealt with the appropriate standard to be used by the district court in ruling on a summary judgment motion.

"**Summary Judgment Criteria**

In both the defendants' brief in support of their Motion for Summary Judgment (Defendants' Brief in Support of Motions for Summary Judgment, Docket Nos. K21, M20) and the Trial Court's Opinion (Transcript, page 18, Docket Nos. K43, M42) there is discussion of the standard to be used by the Court in determining whether summary judgment should be granted. Defendants and the Trial Court assert that the appropriate standard is that set forth in Celotex Corporation v Catrett 477 U.S. 317, 106 S.Ct. 2548, 91 L. Ed.2d 265 (1986); Anderson v Liberty Lobby, Inc. 477 U.S. 242, 106 S.Ct. 2505, 91 L. Ed.2d 202 (1986); and Matsushita Electric Company, Ltd. v Zenith Radio Corp. 475 U.S. 574, 106 S.Ct. 1348, 89 L. Ed.2d 538 (1986).

Plaintiffs contend that a careful reading of these three cases, when examined in connection with the facts and status of this appeal, makes it clear that the rules set forth under this trilogy of Supreme Court decisions do not apply to the determination of whether summary judgment should be rendered for the defendants in this case.

Specifically, defendants in each of the three cases cited above moved for summary judgment on the proposition that there existed no material issue of fact with regard to an issue on which the plaintiff had the burden of proof at trial. That is different from the instant case. Here, the trial court entered summary judgment for defendants on an issue on which defendants would have the burden of proof

> at trial. Plaintiffs contend that that issue, in relation to the provisions of the Michigan Ski Area Safety Act, is the factual issue of whether the "danger" which caused injury to the plaintiffs; i.e. striking a solid wooden pole marking the finish line of a race course, was a danger inherent to the sport of skiing, obvious and necessary."
>
> PLAINTIFFS' BRIEF ON APPEAL, pages 18-19.

The issue of the appropriate standard to be applied to this situation, where the party receiving summary judgment would bear the burden of proof at trial, was not addressed in the Appeal Brief of respondents on the Michigan Ski Area Safety Act issue. Respondents also never addressed the question of whether they would bear the burden of proof at trial on their Affirmative Defense based on the Michigan Ski Area Safety Act.

Oral Argument was held in the Sixth Circuit Court of Appeals September 23, 1991, and that Court's per curiam opinion was filed October 16, 1991, affirming the trial court's grant of summary judgment for respondents. The Court of Appeals did not reach the issues raised by respondents' cross-appeal. Its opinion failed to address the issues raised by petitioners relating to the inappropriate use of *Celotex, supra,* by the district court to justify factual determinations in support of summary judgment for respondents, except to say:

> "Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Celotex Corp. v Catrett, 477 U.S. 317, 322,-23 (1986)."
>
> COURT OF APPEALS OPINION, A-26

The opinion of the Court of Appeals also failed to address the contention of petitioners that the entire issue involving the applicability of the Michigan Ski Area Safety Act was one on which the respondents would bear the burden of proof at trial.

REASONS FOR GRANTING WRIT

The decision of the United States Court of Appeals for the Sixth Circuit departs from the accepted and usual course of judicial proceedings and sanctions such a departure by the court below in such a manner as to call for an exercise of this Court's power of supervision.

In the final analysis, the issues presented by these cases involve the distinction between the court acting as the authority on matters of law, and the jury, acting in its capacity as determiner of facts.

The situation is quite simple. Petitioners asserted liability against respondents for negligence and premises liability in the conduct of the ski race in which petitioners were injured. Petitioners must persuade a finder of fact on each and every essential element of their claims in order to receive a verdict.

Respondents, as part of their defense, raised the provisions of a statute which would protect them from liability, if the factual qualifiers contained in the language of the statute were proven to the jury's satisfaction. On this Affirmative Defense, respondents bear the burden of proof at trial.

Acting *sua sponte*, and without notice to any party that the issue would be considered at this stage of the proceedings, the district judge granted summary judgment for respondents on their Affirmative Defense. That decision necessitated findings by the trial court that the *factual* situation involved in the case met the qualifications set forth in the language of the Michigan Ski Area Safety Act.

In making his ruling, the district judge articulated on the record his reliance on the trilogy of cases decided by this Court in 1986.

> "The Defendants' motion for summary judgment in this matter under Rule 56 posits the fact that there are no facts in issue, there are no material issues, no genuine issues of material fact that are in contest. When positing the motion in this matter, the obligation then comes to the

> non-moving party, again Plaintiff in this case, to make a sufficient showing that there is a genuine issue or a genuine dispute with relation to the existence of a particular element or elements of the Plaintiffs' cause of action. If there is no genuine issue of material fact, then summary judgment in favor of the Defendant will be granted under Celotex and Anderson v. Liberty Lobby and the others.
>
> Now, the Court is permitted, of course, under this new line of cases to evaluate the evidence, to determine what a trier of fact could reasonably infer. But this Court believes that the issues that are presented for purposes of resolution of this motion may be categorized into two. One is the releases of three different kinds that are involved in this case, at least in this motion; and the second is the Michigan Ski Area Safety Act."
>
> DISTRICT COURT OPINION, A-14,15

Unfortunately, the district judge failed to recognize the context of the issues he was deciding, specifically that the matters being decided (at least partially on his own motion) were matters which the respondents were obliged to prove, not "particular elements of the Plaintiff's cause of action."

There was no evidentiary record before the trial court at the time of the summary judgment bearing on the *factual* issues raised by the language of the Michigan Ski Area Safety Act.[2] The trial court did examine three photographs of the scene of the injuries and had available to it the transcripts of discovery depositions of both petitioners which were filed by respondents in support of their Rule 56 motions.

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[2] Prior to the motion hearing, each side had taken discovery depositions of various experts named by both petitioners and respondents. Those depositions had extensive testimony relative to the necessity for the particular pole which caused the petitioners' injuries, and its purpose, or lack thereof. Those evidentiary materials had not been filed with the trial court prior to the motion hearing because there was no advance notice that the district court would be considering any issues involving the Michigan Ski Area Safety Act.

Based on his examination of the photographs of the accident scene and his own assumptions about the conduct of a downhill ski race, the district judge made some interesting *factual* observations.

> "It would appear that in a downhill race, a skier would normally expect a finish line and would normally expect that that finish line has some kind of demarcation, and would normally expect that that demarcation would be of a nature that would be clearly visible and certainly wouldn't be movable. Otherwise the race wouldn't be fair. And here these appear to not be movable finish line posts, but they appear to be a part, inherent part of the skiing apparatus that these Plaintiffs were engaging in."
>
> DISTRICT COURT OPINION, A-19

In response to a request by petitioners' counsel to clarify his ruling, the district judge went on to say:

> "It seems to this Court that, first of all, they're obvious. The pictures indicate that, and it seems to be the concurrence of the parties as to the facts would indicate that it was obvious.
>
> Were they necessary? What does necessary mean? Does it mean that the ski resort couldn't operate without them, or does it mean that they were not unnecessary? Now, it seems to me that if I take these pictures and I take the Plaintiffs' characterization of finish line poles to be what they are, then I cannot say that these poles as they were positioned were unnecessary; and therefore, I'm left with the conclusion they were a necessary part of the componentry that made Indianhead, this particular hill, this particular Alpine downhill race, just like the lifts, just like the banners, and all the other directions as to what the skier was to do."
>
> DISTRICT COURT OPINION, A-21

The trial court concluded that the Michigan Ski Area Safety Act applied to the *factual* situation before it and ordered summary judgment for respondents on that basis.

> "My opinion is based on the Michigan Ski Area Safety Act. It is not based upon the releases because as it pertains to releases, I find, as I indicated, there are issues of material fact."
>
> DISTRICT COURT OPINION, A-22

Are *factual* decisions required before the applicability of the Michigan Ski Area Safety Act can be determined? Yes! To come within the parameters of the Act's language, at a minimum the "danger" causing injury must be one inherent to the sport of skiing, the "danger" must be obvious and the "danger" must be necessary. Deciding whether the "danger" fits these qualifications requires a decision on *facts*. Before the construction of the Michigan Ski Area Safety Act is even considered, a preliminary determination has to be made that it applies to the *factual* situation.

By its terms, the Michigan Ski Area Safety Act only applies in situations where the "danger" causing injury is inherent to the sport and both obvious and necessary. All three qualifiers must be met before the Michigan Ski Area Safety Act is applicable.

The significance of all of this is that before respondents can claim protection under the Michigan Ski Area Safety Act they must affirmatively prove, to the satisfaction of the finder of fact, that the "danger" which caused injury was (1) inherent to the sport of skiing, (2) obvious and (3) necessary.[3]

---

[3] There is presumably another avenue available to respondents. The Michigan Ski Area Safety Act lists certain "dangers" which are defined by the statute to be inherent to the sport and both obvious and necessary. But the district court found that the telephone pole which petitioners struck was not included in the specific list contained in the Michigan Ski Area Safety Act.

> "The more difficult question is whether or not these poles fit within the classification. Certainly they're not part of the natural growth or debris or trees, as in the Schmitz v. Cannonsburg case that I'll talk about in a minute; nor were they were part of the collision with ski towers and their components, with other skiers, or with properly marked or mainly visible snow-making or snow-grooming equipment.

But there was no evidentiary record before the court to assist it in deciding these *factual* matters, and respondents made no attempt to place any evidence before the trial court to establish the required *factual* elements of their Affirmative Defense.

Even had respondents moved for summary judgment on the basis of the Michigan Ski Area Safety Act, and even had the guidelines of *Celotex, supra,* been applicable, the trial court did not have before it any showing by respondents of an absence of material factual dispute as required by *Celotex, supra.*

> "Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact."
>
> *Celotex, supra*, page 323.

But the guidelines of *Celotex, supra,* do not apply to this summary judgment "motion", since it involves an issue on which respondents have the burden of proof. Nonetheless, the district judge, in the absence of evidence on the matters, found that the telephone pole in question was an inherent part of the skiing apparatus, that the pole was obvious and that it was "not unnecessary". [4]

---

3 (cont.)

> It appears to have been none of those categories, but it appears that the language has to be read as the Legislature of Michigan intended it, and it says these dangers "include but are not limited to." A plain reading would indicate that the legislature sought to set forth illustratively those matters which would be both of a natural terrain nature in the dangers and those matters which would be part of the inherent skiing equipment nature that are there on a ski hill and a skier is going to be confronted with them, and if the skier is in a downhill Alpine race, what can that skier expect to be confronted with.
>
> DISTRICT COURT OPINION, A-18

[4] DISTRICT COURT OPINION, A-21,22

The Court of Appeals simply refused to address issues raised by petitioners relating to the appropriateness of the district court's grant of summary judgment based on the Michigan Ski Area Safety Act. Although the body of the opinion begins by stating that the Court of Appeals reviews a grant of summary judgment *de novo*, the opinion went on to unquestioningly accept the district court's findings. In addition, the Court of Appeals opinion endorsed the concept of the trial court making *factual* determinations.

> "In cases where the manner of injury is not specifically mentioned in the Act, the court must look to see whether the danger is similar to those mentioned and thus covered by the "including, but not limited to" language of the statute."
>
> COURT OF APPEALS OPINION, A-28

Do we still have a system where a jury decides factual disputes and judges determine the law? The history of the proceedings of these cases raises serious doubt. This Court's ruling in *Celotex, supra*, is being cited as a basis for the trial court's determining facts in a situation where the party seeking judgment under Rule 56 has the burden of proof at trial.

Justice RENQUIST, writing for the majority in *Celotex, supra*, carefully limited the scope of that decision to those instances where the non-moving party would bear the burden of proof at trial on the issue before the court. Here, the trial court, with the obvious blessing of the United States Court of Appeals for the Sixth Circuit, has used *Celotex, supra*, in a manner not contemplated by this Court, to defeat petitioners' right to have a jury decide whether respondents have been able to prove that the "danger" which resulted in injury to petitioners was one which was inherent to the sport of skiing, obvious and necessary. If this Court did intend such a result from its *Celotex, supra*, decision, then the right to a jury trial on factual issues has been reduced to a sham.

In the realities of litigation, of course, the result in any individual case is of earth-shattering importance only to the parties involved. But if the decisions of the trial court and the United States Court of Appeals for the Sixth Circuit in these cases are al-

lowed to stand, unexamined by this Court, the distinction between a court as the authority on matters of law, and a jury as determiner of facts, will not only have been blurred beyond recognition, it will have been obliterated.

CONCLUSION

The district court inappropriately used this Court's decision in *Celotex, supra*, to make factual findings to support its grant of summary judgment for respondents on an Affirmative Defense. Although that specific issue was brought to the attention of the United States Court of Appeals for the Sixth Circuit, the opinion of the Court of Appeals, affirming the district court's order, failed to address that issue. The decision of the United States Court of Appeals for the Sixth Circuit departs from the accepted and usual course of judicial proceedings and sanctions such a departure by the court below in such a manner as to call for an exercise of this Court's power of supervision.

RELIEF REQUESTED

For the foregoing reasons, petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Petition for Certiorari have been served, by first class mail, on this 12th day of December, 1991, upon:

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William I. McDonald

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

ARDELL KIDWELL,

Plaintiff,

VS. File No. 2:89-CV-61

WAKEFIELD PROPERTIES, INC.,
a Michigan corporation,
INDIANHEAD SKI CORPORATION,
a Michigan corporation,
INDIANHEAD MOUNTAIN RESORT, INC.,
a Michigan corporation, and
RONALD E. VINCENT,

Defendants.

DAVID R. MASCIOLA,

Plaintiff,

VS. File No. 2:89-CV-62

WAKEFIELD PROPERTIES, INC.,
a Michigan corporation,
INDIANHEAD SKI CORPORATION,
a Michigan corporation,
INDIANHEAD MOUNTAIN RESORT, INC.,
a Michigan corporation, and
RONALD E. VINCENT,

Defendants.

Hearing Re: Defendants' Motion for Summary Judgment

Before:

THE HONORABLE ROBERT HOLMES BELL
U.S. District Judge
September 20, 1990

PRESENT:

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U.S. District Court Reporter

Marquette, Michigan
September 20, 1990
8:55 a.m.

PROCEEDINGS

THE COURT: We are here in the matter of Kidwell versus Wakefield Properties and Masciola versus Wakefield Properties, being our files number 2:89-CV-61 and 2:89-CV-62. Mr. McDonald represents the Plaintiffs in these two matters, and Mr. Rodgers

MR. VANDERVEEN: It's John VanderVeen, Your Honor, of the firm of Menmuir, Zimmerman, Kuhn and Bearup behalf of the Defendants.

THE COURT: You're from Mr. Rodgers' firm?

MR. VANDERVEEN: Correct, Your Honor.

THE COURT: Very well, represents the Defendants in this matter. This is the Defendants' motion for summary judgment.

You may proceed, then, Mr. VanderVeen.

MR. VANDERVEEN: Thank you, Your Honor.

Your Honor, this is, as you stated, the Defendants' motion for summary judgment on these two separate actions which have been consolidated for trial. Plaintiffs in both these cases are residents of the State of Illinois. and these cases are in federal court under the diversity statute. These motions are brought pursuant to Federal Rule 56 on the basis that there is no genuine issue as to any material fact, and a judgment should be granted the Defendants as a matter of law.

For factual background in this matter, Your Honor, on, the weekend of March 15th and 16th in 1986, both the Plaintiffs took part in a weekend of Alpine ski racing at Indianhead Resort. They were both members of Chicago area ski clubs which were under the umbrella of an organization called the Chicago Metropolitan Ski Council. Both Plaintiffs have testified that they were experienced amateur ski racers, and on Sunday, the 16th of March, 1986, while participating in a race on a hill that's called the FIS Hill at Indianhead, both of the Plaintiffs were injured. Plaintiff Ardell Kidwell was injured when she lost control and hit a padded pole marking the finish line.

THE COURT: That's part of what I think is fairly crucial to my understanding of this case. You're contending it was a padded pole?

MR. VANDERVEEN: Correct, Your Honor.

THE COURT: And this is undisputed?

MR. VANDERVEEN: I believe --

MR. McDONALD: I think it's now undisputed, Your Honor, because we've come into possession of photographs of the finish line that day.

THE COURT: There was some discussion as to whether or not there was a banner stretching from this pole to another pole or another fixed object saying "Finish Line." Is that in contest?

MR. VANDERVEEN: I believe there was no banner. I think

MR. McDONALD: There was no banner.

MR. VANDERVEEN: I think our people testified there was no banner on the poles.

THE COURT: Okay. Somebody -- I see here in a couple places I read something about a banner. Leaving that issue aside, was there some indication in this area that this was a marking that was at least one-half of the finish line demarcation?

MR. VANDERVEEN: Yes, I believe so, Your Honor, because they had both participated in races the previous day which were marked by the same -- I guess the question is did they know these were the finish line poles or --

THE COURT: No, maybe I don't know enough about this particular hill or anything, but there's reference made to the fact there was a telephone pole.

MR. VANDERVEEN: Correct.

THE COURT: And then there was reference to the fact that it was a pole pole, and now I understand it was a padded pole. I want to be sure we all have a -- two of your briefs talk about quite different structures, and under the Ski Area Safety Act for the State of Michigan I want to make sure we all have it clearly in mind what we're talking about.

MR. VANDERVEEN: Your Honor, just for clarity, I think they've been referred to as telephone poles with that being used as a generic term to describe what kind of pole it actually was. They weren't holding up telephone lines, et cetera. Mr. McDonald has pictures here.

THE COURT: Good. You're all agreed?

MR. McDONALD: These have not been authenticated by the taker of the photographs yet, but I expect that will happen, Your Honor, and I think the Plaintiff will agree that that's the depiction of the race area as it existed that day.

THE COURT: You concur?

MR. VANDERVEEN: Well, Your Honor, we haven't had an opportunity to -- these photographs were provided by the Plaintiff. We have not had an opportunity to examine the photos, et cetera, or the taker of the photos.

MR. McDONALD: The taker of the photos. She didn't take it.

MR. VANDERVEEN: It was someone separate from the Plaintiff, and they haven't been deposed yet.

THE COURT: No, no. Let me make very clear, under the Ski Area Safety Act for the State of Michigan there's some very clear prerequisites if I'm going to look at that Act, and I want to

make sure I understand. If this is for all intents and purposes the Plaintiffs' position, I'm asking if you accept that position, then, as to the characterization of the poles for purposes of this motion.

MR. VANDERVEEN: Yes, Your Honor, yes.

THE COURT: Good. Okay, okay. We'll go from here, then.

MR. VANDERVEEN: Okay. Just describing the accident further, Your Honor, I think the testimony is that Ardell Kidwell came down, lost control somewhere before she reached the poles, and collided with one of the poles. Mr. Masciola's accident was similar except for the fact that he did not actually collide with the pole. His ski tip caught the pole as he was losing control. The ski tip caught the pole and he careened off beyond the pole. So he did not actually come into contact with his body with the pole. Because of these injuries and these incidents, both Plaintiffs have brought this lawsuit against Indianhead and also against the Chicago Metropolitan Ski Council in a separate action in the Illinois state court.

We brought our motion today based on documents which we feel constitute a release of liability as to the Defendants. Prior to participating in any Chicago Metropolitan Ski Council race, Ardell Kidwell signed a few documents which I believe were attached to our motion as Exhibits A and B.

THE COURT: But they release Chicago Metropolitan. They don't release the sites where they are, do they?

MR. VANDERVEEN: Well, Your Honor, it's our position that the language of that release, particularly the sentence that I'm quoting from, I believe they have identical language, "The undersigned hereby understands and agrees to personally assume any and all of the liability and risks of alpine racing," we feel that that language is broad enough and specific enough to act as a release to all parties.

I would point out that the language of the paragraph following that sentence goes on to state that: "Further, the undersigned hereby agrees to hold harmless the Chicago Metropolitan Ski Council." So I think that the fact that the word "further" is in there implies that the sentence preceding it indicates that there's a release implicit in that language also.

THE COURT: As a matter of law, how can the Chicago Area Ski Club release liability for third-party entity land owners who are not named? It's your position they can?

MR. VANDERVEEN: I believe it is, Your Honor. It is our position -- I think the analogy is releases that are executed, for instance, in settling a lawsuit where language is put in saying you're not only releasing the defendant, but you're releasing all entities as to claims brought under -- you know, arising out of a given incident. I think as a matter of law it's our position that that can be done.

THE COURT: For consideration?

MR. VANDERVEEN: The consideration, well, --

THE COURT: In lawsuits --

MR. VANDERVEEN: Pardon me?

THE COURT: In lawsuits there's consideration. Here there was no consideration.

MR. VANDERVEEN: Well, they're giving her the right to race under the Chicago Metropolitan Ski Council auspices and to race at the areas that the Chicago Metropolitan Ski Council plans events in, racing events.

THE COURT: Continue.

MR. VANDERVEEN: Okay. The second release issue, Your

Honor, moving on, is the NASTAR releases which were executed by both Plaintiffs as opposed to the ones we were just discussing, which is just executed by Ms. Kidwell.

THE COURT: But the problem is the Plaintiff has produced some evidence that says this was not NASCAR, whatever the acronym. Not NASCAR, but

MR. VANDERVEEN: NASTAR.

THE COURT: NASTAR. This was not a NASTAR-sponsored race.

MR. VANDERVEEN: Well, we've got Barry Bolich, who's the Director of Skiing out at Indianhead, who's testified it was a NASTAR race. The letter attached to the brief by Mr. McDonald first of all is hearsay. It doesn't meet the affidavit requirements of the court rule. We don't know, you know, how the question was posed to Mr. Atwood, et cetera. I don't feel that this is a substantial or a significant rebuttal to Mr. Bolich's testimony.

The results were sent to NASTAR. Bolich has described it as a super NASTAR race, which NASTAR was trying to develop somewhat a faster race than the general NASTAR. Plaintiff seems to be hanging their hat on the fact that NASTAR does not sponsor, quote unquote, "downhill races," and apparently CMSC tagged the label "downhill" on this event. But what the Court should realize is that the term "downhill" in a ski competition means a very specific thing. There's an organization known as FIS, an international organization which sets the standards for downhill ski racing events. The hill that this race was conducted on at Indianhead was not capable of holding a downhill race, according to the standards of the FIS and the various United States ski organizations. It doesn't have enough vertical drop. It's just not a hill that you could ever have a true downhill race on.

There's also been testimony to that fact from our two experts who are involved in downhill racing. In fact, I've got the -- for

what it's worth, we do have the measurements of the hill and the FIS standard on what is a downhill race, and this simply was not a downhill race. It was more akin to a giant slalom or a super giant slalom. So the fact that CMSC or someone called it a downhill does not answer the question.

Again, we've got Barry Bolich, who's the Director Of Skiing out there at Indianhead, saying yes, this is a NASTAR race. We sent the results to NASTAR. It's his testimony he did talk to Mr. Atwood about this race. So I think that it's kind of a red herring. This issue as to whether it's a downhill or not is a red herring which isn't significant, and again, I don't think that the letter from Mr. Atwood constitutes, you know, sufficient evidence to rebut the testimony of Mr. Bolich.

The third release, moving on, or the third item, tickets, which were lift tickets which were provided to both the Plaintiffs in this case, the Court has those. I don't know if you'd like me to read the language of it. It's kind of a standard release lift ticket-type language.

THE COURT: Yeah, that's an understatement, right.

MR. VANDERVEEN: Correct, Your Honor. Again, Plaintiff is saying, Well, we didn't -- there's no evidence that we read these or understood them, et cetera. These people are experienced skiers. They've testified that they've skied at Indianhead before. I think it's safe to assume that they can be charged with knowledge of what is on those tickets.

There's Michigan case law saying that the fact that a person has not read a release does not necessarily abrogate that release. These are sophisticated Plaintiffs. They're not illiterate. They're both in jobs that require reading and knowledge of various documents, and I think as experienced skiers they knew what was on those tickets and they knew about the risks inherent in racing. And again, I think that's reflected in the Michigan Ski Area Safety Act which speaks about charging skiers with the knowledge that

skiing, downhill skiing is dangerous and that skiers have to accept the risks inherent in that sport, and I think those risks would include such things as falling and colliding with an object.

I think the point is raised by the Plaintiff that no consideration was given, there wasn't a bargain struck. I would argue that there was consideration given, and that's the right to ski at the resort in those races.

I would also refer to the decision of the Michigan Court of Appeals in Tope v. Waterford Racing where the Court holds that one can execute a release releasing the other party from negligence as long as it's not gross negligence and isn't offensive to public policy. I don't think in this case, where you've got people downhill racing of their own volition, that enforcing these releases would be against public policy. I think, as in Waterford Racing, which involved automobile racing, you've got a sport where the participants know it's dangerous, they know the risks involved and go into it voluntarily.

So again, Your Honor, I would ask that the Court grant our notions.

THE COURT: Thank you. Thank you. Response, Mr. McDonald?

MR. McDONALD: Thank you, Your Honor. First, Mr. VanderVeen has indicated that he believes that this question of whether this race was a downhill event or not is a red herring. On the contrary, Your Honor, it is the piece of evidence that makes it clear that this race was not a NASTAR event, and if Your Honor will look at the pleadings in this matter, from the beginning the allegation has been expressed that this was in fact a downhill race, and that fact has been admitted by the Defendant in their answer.

In addition, the two experts who have been deposed who have been named by the Defendant, with the exception of Mr. Bolich, and that's Mr. Agee and Mr. Lind, have both testified that

to their knowledge NASTAR never, ever sanctions downhill events, and downhill is a specific term of art in the field of Alpine ski racing. This entire matter of whether this is a NASTAR event or not is a red herring being thrown up by the Defendant to take advantage of releases that were signed by my clients to participate in NASTAR events, which, by the way, were being held that weekend at Indianhead on another hill. It's always been the Plaintiffs' position in this matter, Your Honor, that these were not NASTAR events and that the releases that are shown as exhibits to Defendants' motion have no bearing on this matter.

Plaintiff Ardell Kidwell takes a similar position with regard to Exhibits A and B, which deal only with the Chicago Metropolitan Ski Council. It's hard to imagine how the Defendant intends to stretch the language of this purported agreement between those two parties into covering his negligence or its negligence at a later event when there's no indication that any of the parties contemplated that later event, but there's certainly no indication that there was any consideration for any release given by the Defendant to my clients.

I don't really have much to add, Your Honor, to the discussion of the lift ticket language. I dealt with that extensively in my brief. I believe that those types of adhesion contract provisions have been dealt with severely by the courts.

Here Counsel would argue that Michigan law supports the proposition that the fact that a person does not read a release does not abrogate the release. Well, I would ask Counsel if that is intended to apply to a release that is not signed. His analogy breaks down. When you sign a release in a lawsuit, you have commenced an action, you've picked your defendants. Presumably you've been subject to the mandatory joinder rules. You've decided to settle that action and you are now signing a release for consideration. That situation is not at all analogous to the lift ticket language that is being impressed on us here.

The Defendant attached an opinion from an earlier case in support of its propositions. I submit to the Court that that opinion does not provide solace to this Defendant; that the facts that are recited in that opinion make it clear that that was a release that was signed by the Plaintiff, whether read or not, and applied to specific events, in this case defects in the equipment that was rendered and which then resulted in the signing of this release. If I understand this opinion correctly, the remainder of the allegations of negligence on the part of this Defendant were not dealt with in this matter.

But I fail to see how that supports the Defendants' proposition here that the lift ticket language, unsigned by the Plaintiff, perhaps unknowing by the Plaintiff, and certainly not the subject of any express agreement by the Plaintiff, constitutes a full release of any action, omission, negligence, premises liability on the part of the Defendant. That simply isn't the way those matters have been handled by the courts, and I think that the cases cited in my brief make it clear that even in situations where such language has been the subject of a signed agreement by the plaintiff, that the courts are going to bend over backwards to construe that language as heavily as they can against the drafter of the adhesion contract. The Rosen case makes it very, very clear. Even though it's a limited precedent opinion, the Hackel case cited in the brief deals with exactly the language that is in use here and makes it pretty clear that they are not going to construe that as a release unqualified of any of the defendant's actions.

The last point I'd like to make, Your Honor, is that the Michigan Ski Area Safety Act has been raised, although really not argued, in this motion. Careful reading of the Michigan Ski Area Safety Act is important to this case, and if you'll look at the Michigan Ski Area Safety Act, and particularly the section that deals with the skier's responsibility, you'll find that it sets a statutory assumption of the risk defense for certain things. Those things are delineated in that provision of the statute, and they deal essentially with collisions with other skiers, collisions with lift

towers and other objects. They deal with dangers that are necessary and inherent to the sport of skiing.

The poles that were placed by the Defendant to mark the ends of this finish line meet neither of those tests. They are not necessary and they are not an inherent danger of skiing. I think it's clear on reading of that provision of the Michigan Ski Area Safety Act that the Defendant is not going to obtain any release from that Act in these cases. Thank you.

THE COURT: Thank you. Thank you.

Response?

MR. VANDERVEEN: Your Honor, I just have a quick response to a few of the points Mr. McDonald made. First of all, it's true that our experts stated that NASTAR does not sponsor downhill events, and we're not contesting that. What we're saying is this is simply not a downhill event. Under any standards that any ski organization uses, this is not a downhill event.

Mr. McDonald points out that NASTAR was being held on another hill that day or that weekend. Well, that may be true, but it was also being held on this hill, and I don't think that's pertinent.

He talks about the signature on the tickets, and I don't think that a signature is necessary. This isn't a statute of frauds question or anything of that nature. I don't think the signature argument is pertinent.

Again, going to the releases, I'd just like to point out that the Hackel case that is relied so heavily on by the Plaintiff is an unpublished Wisconsin decision that is not precedent in Michigan and Michigan law. Thank you, Your Honor.

THE COURT: Thank you.

MR. McDONALD: Your Honor, may I make one small response?

THE COURT: Okay.

MR. McDONALD: Defense Counsel is arguing that this matter is not to be considered a downhill event because it does not meet FIS standards. And yet if Your Honor looks at the deposition of Mr. Bolich, when I questioned him heavily about standards that apply to this particular race, you'll find it quite clear that Mr. Bolich now does not want the FIS standards to apply to this race because the FIS standards deal with the construction and the safety of the finish line.

They simply cannot have it both ways, Your Honor. This is a downhill race. This is a downhill Alpine race by admission in the pleadings, it's labeled that way, and everyone who participated in this race, with the exception of Mr. Bolich, is willing to agree that this was a downhill race. Thank you.

THE COURT: Thank you.

The Defendants' motion for summary judgment in this matter under Rule 56 posits the fact that there are no facts in issue, there are no material issues, no genuine issues of material fact that are in contest. When positing the motion in this matter, the obligation then comes to the non-moving party, again Plaintiff in this case, to make a sufficient showing that there is a genuine issue or a genuine dispute with relation to the existence of a particular element or elements of the Plaintiffs' cause of action. If there is no genuine issue of material fact, then summary judgment in favor of the Defendant will be granted under Celotex and Anderson v. Liberty Lobby and the others.

Now, the Court is permitted, of course, under this new line of cases to evaluate the evidence, to determine what a trier of fact could reasonably infer. But this Court believes that the issues that are presented for purposes of resolution of this motion may be categorized into two. One is the releases of three different kinds

that are involved in this case, at least in this motion; and the second is the Michigan Ski Area Safety Act.

As to the releases, there appears to be the Chicago Metropolitan Ski Council releases. This Court finds that the facts and circumstances before this Court raise a genuine issue of material fact as to whether or not the releases as a matter of fact and as a matter of law cover premises liability such as we have here or whether the releases really were releases designed to release the Metropolitan Ski Council as an entity.

There's no consideration running from the landholders, ski areas that relate to this release. This Court finds it very difficult to believe that a release could be worded in such a manner as to release unnamed entities which had paid no consideration for acts of negligence or even intentional acts. It just makes no sense.

The second one, the one that the parties intended to center in on but I don't really think it's essential to our disposition of this case today, is the question of whether this that has been characterized as a downhill Alpine race was NASTAR-sponsored; if NASTAR-sponsored, whether the release of all persons participating in a NASTAR-sponsored race is applicable in this case. There appears to be sufficient rebuttal under the signed statements of the parties and under the letter that has been introduced here by the Plaintiff to indicate that there really is an issue of fact as to whether -- genuine issue of material fact, material, I don't know, but at least an issue of fact -- as to whether or not this was NASTAR-sponsored.

The third release is the release that goes to the lift tickets, and I concur with Plaintiff that in this particular case where there was no signed release, where it was merely in the nature of a receipt given for consideration without any acknowledgment on behalf of a participant who purchased a ticket, that it isn't evidence of an adhesion situation where the party, without having knowingly intended to waive releases, does so.

I think the opinion which this Court rendered in a different case completely some time ago clearly on its facts -- where is it here -- on another ski case that the Court dealt with in Formby v. Pine Mountain, M89-50001-CA, this dealt with a signed release of rental ski equipment and an injury which was related allegedly to the ski equipment's malfunction, and this Court said that that release barred the Plaintiff from suit because the Plaintiff had knowingly, intentionally signed a release of liability. In a lift ticket situation this doesn't occur.

Let me get to what I think is the most important issue in this motion, and that is the Michigan Ski Area Safety Act. As Counsel correctly noted, this is a diversity case. This Court has diversity jurisdiction and, therefore, must apply Michigan law.

This Court has reviewed the three pictures that have been introduced here, and as this Court indicated at the outset of arguments, factually there appears to be some blurring as to exactly what was the finish line where the injuries occurred, and this Court notes the following in the picture: That there were a series of poles, I can see three of them, one of them way off to one side and two of them rather close together. I say rather close together, separated by approximately 20 feet or 25 feet from one another. Leading to these poles in almost a funnel-like capacity pointing toward those poles are a series of what appears to be unfixed, unsecured, certainly shoved into the snow smaller poles on which banners appear to have been hung. Those banners appear to be in a funneled fashion directing skiers in between these two fixed poles, again about ten, fifteen feet tall. They appear to be six or eight feet in diameter. They appear to narrow as they get to the top, so obviously these are trees that someone cut down, took the bark off and put in the ground.

They appear to be padded up to about the first three feet or so, and in front of them appears to be the following configuration. In front of each about six feet out toward where the skier would enter appears to be two orange -- bright orange, same color as the padding, same color as the banners -- poles, small poles, more like

regular ski poles, breakable-type poles. Three or four feet up on those poles appears to be a swatch of, again, this bright orange-red material about two feet across and two feet high, maybe, affixed between these two fixed ski-type poles immediately in front of the fixed larger pole, which was covered along the bottom, protected along the bottom.

This has been characterized as the finish line for this so-called downhill Alpine race. It appears, then, to be fixed. Right behind it appears to be an abandoned mobile home trailer -- not abandoned, but certainly one that is used for some purposes other than residential living, with a large window in it which appears to be jerry-built or cut out of the mobile home facing the ski area right immediately behind one of these poles, and this appears to be somewhat flat terrain, at least not slipping more than two or three degrees.

The significance of this is that under the Michigan Ski Area Safety Act, MCL 408.342(2), the following language is inserted:

> "Each person who participates in the sport of skiing accepts the dangers that inhere in that sport insofar as the dangers are obvious and necessary. Those dangers include" -- here's the key language -- "but are not limited to, injuries which can result from variations in terrain; surface or subsurface snow or ice conditions; bare spots; rocks, trees, and other forms of natural growth or debris; collisions with ski lift towers and their components, with other skiers, or with properly marked or plainly visible snowmaking or snow-grooming equipment."

Now, it appears that both Plaintiffs contend that they were experienced skiers, in the amateur classification but experienced, and that prior to the races that they intended to participate in, they took their allowed practice run down the course; that as a precaution, they each wore crash helmets for safety, something that most skiers do not ordinarily wear. Near the bottom of the course each Plaintiff contends that he and she hit what they call a compression

or dip in the surface of the run, causing them to lose their balance; that having lost their balance -- each is worded a little differently, but I'm summarizing the two of them, for purposes of this discussion having lost their balance, they then careened off and collided with one of these fixed poles, I believe the one on the right side going into these finish line poles, and as a result of this collision, sustained these rather painful and extensive leg injuries and hip injuries. Certainly serious injuries for ski injuries.

Now, the issue that this raises, that this motion raises for judicial determination is whether or not as a matter of law these poles marking the finish line in this race are part of the dangers inherent in skiing. I think we can say right away that the striking of a compression or an iced surface near the bottom is part of the natural terrain. That's very easily resolved from the language of the Ski Act.

The more difficult question is whether or not these poles fit within the classification. Certainly they're not part of the natural growth or debris or trees, as in the Schmitz v. Cannonsburg case that I'll talk about in a minute; nor were they were part of the collision with ski towers and their components, with other skiers, or with properly marked or mainly visible snow-making or snow-grooming equipment.

It appears to have been none of those categories, but it appears that the language has to be read as the Legislature of Michigan intended it, and it says these dangers "include but are not limited to." A plain reading would indicate that the legislature sought to set forth illustratively those matters which would be both of a natural terrain nature in the dangers and those matters which would be part of the inherent skiing equipment nature that are there on a ski hill and a skier is going to be confronted with them, and if the skier is in a downhill Alpine race, what can that skier expect to be confronted with.

It's very significant to this Court that -- a couple of things are interesting. Ski towers and their components, and their

components means those parts that help put the skiers up on the hill and help bring them down. Other skiers. Well, that's obvious. But properly marked or plainly visible snow-making equipment. Now, what would happen if the pole were in the run, but were painted white? Well, it would appear that it would not have been plainly or visibly marked, and therefore, it would appear to be arguably outside the parameter, something that a skier would not normally expect while skiing on the ski run.

It would appear that in a downhill race, a skier would normally expect a finish line and would normally expect that that finish line has some kind of demarcation, and would normally expect that that demarcation would be of a nature that would be clearly visible and certainly wouldn't be movable. Otherwise the race wouldn't be fair. And here these appear to not be movable finish line posts, but they appear to be a part, inherent part of the skiing apparatus that these Plaintiffs were engaging in.

Now, Schmitz v. Cannonsburg is 170 Michigan Appeals 692. It was decided approximately two years ago in August of '88, and I want to quote it. It involves, and I read it carefully the other day, it involves a person running into a tree on a ski run. Clearly totally different than this case here, totally different than this case. But it's interesting here that the language of the Michigan Court of Appeals on an essential issue before us is rather instructive. The language reads as follows, quote:

> "It is clear from the plain and unambiguous wording of Section 22(2)" -- the one that this Court just read -- "that the Legislature intended to place the burden of certain risks or dangers on skiers, rather than ski resort operators. Significantly, the list of 'obvious and necessary' risks assumed by the skier under the statute involves those things resulting from natural phenomena, such as snow conditions or the terrain itself; natural obstacles, such as trees and rocks; and types of equipment that are inherent parts of a ski area, such as lift towers and other such structures or snow-making or grooming equipment when prop-

> erly marked. These are all conditions that are inherent to the sport of skiing. It is safe to say that, generally, if the 'dangers' listed in the statute do not exist, there is no skiing. Therefore, it is logical to construe this section of the statute as an assumption of the risk clause that renders the reasonableness of the skiers' or the ski area operator's behavior irrelevant. By the mere act of skiing, the skier accepts the risk that he may be injured in a manner described by the statute. The skier must accept these dangers as a matter of law."

Now, far be it from me to second-guess the Michigan Court of Appeals. I think this is rather strong language, and this assumption of risk, I think, if I read this particular statute, has certain qualifiers within it, and that is things have to be visibly marked. Terrain must be at least somehow obvious in some manner, and therefore, I think that without saying so, hopefully the Court of Appeals intended that this language here be reasonably construed by the courts, and perhaps other cases would hopefully indicate that.

But anyway, it seems to this Court the motion should be granted, and this Court does in fact grant this motion, Defendants' motion to dismiss on the basis of the fact that these poles at this particular downhill race at Indianhead were a part of the fixtures of the Indianhead Ski Resort such as that were a part of the natural and probable and foreseeable risk to skiers should they collide with them; that there is nothing hidden about them, there is nothing about them which was out of place with the character of that which was taking place at that particular time. Certainly it's most unfortunate that this injury occurred to people that were such fine skiers and under normal circumstances would never have found themselves in this situation. But it seems to me that the Legislature of Michigan has spoken, and this Court must effectuate that State policy and so does in this Court's opinion.

Anything else for the record, Mr. McDonald?

MR. McDONALD: Your Honor, may I ask for a clarification? You've indicated your reasons for your order. I would ask that you clarify your position on the included term in the statute, and I believe that the term is "obvious and necessary", by making it clear that you believe that the existence of these poles constitutes a necessary accoutrement to the ski area.

THE COURT: It seems to this Court that, first of all, they're obvious. The pictures indicate that, and it seems to be the concurrence of the parties as to the facts would indicate that it was obvious.

Were they necessary? What does necessary mean? Does it mean that the ski resort couldn't operate without them, or does it mean that they were not unnecessary? Now, it seems to me that if I take these pictures and I take the Plaintiffs' characterization of finish line poles to be what they are, then I cannot say that these poles as they were positioned were unnecessary; and therefore, I'm left with the conclusion they were a necessary part of the componentry that made Indianhead, this particular hill, this particular Alpine downhill race, just like the lifts, just like the banners, and all the other directions as to what the skier was to do.

Now, for the record, I wish Counsel would do this. Should there be an appeal therefrom, I would desire that these three pictures that the Court has now reviewed be marked Joint Exhibits 1, 2, and 3 so that if an appeal is ever taken from this, someone has a chance to look at what this Court has looked at, which has been of material assistance to this Court in helping it get an understanding of what is involved here.

Anything else, Mr. McDonald?

MR. McDONALD: Yes, Your Honor, and that is I would ask you to clarify for the record the basis on which your order is now being granted, because the motion for summary judgment made by the Defendants is not based on the affirmative defense pled in their answer concerning the Michigan Ski Area Safety Act.

THE COURT: I think there's reference made to it in the motion, though.

MR. McDONALD: There is.

THE COURT: My opinion is based on the Michigan Ski Area Safety Act. It is not based upon the releases because as it pertains to releases, I find, as I indicated, there are issues of material fact.

MR. McDONALD: All right. I would point out --

THE COURT: Excuse me, Mr. McDonald. Don't argue with me. I've already ruled. You know how to get to Cincinnati from here.

MR. McDONALD: I'm sorry. Okay.

THE COURT: You may take these exhibits.

MR. McDONALD: Do you want them marked, Your Honor?

THE COURT: If you would please just mark them for yourself. You don't have to introduce them to the Court and you can keep them, and should any reference be made, you'll know that Mr. McDonald or someone has custody of them.

That's all. Thank you, gentlemen.

(Proceedings concluded at 9:40 a.m.)

CERTIFICATE OF REPORTER

I, Kevin W. Gaugier, Official Court Reporter for the United States District Court for the Western District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a true and correct transcript of the proceedings had in the within-entitled and numbered cause on the date hereinbefore set forth.

I do further certify that the foregoing transcript was prepared by me.

/s/ Kevin W. Gaugier

Kevin W. Gaugier, CSR-3065
U.S. District Court Reporter
406 Federal Building
Grand Rapids, MI 49503

Nos. 90-2142/43/44/45

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ARDELL KIDWELL, and
R. DAVID MASCIOLA,

Plaintiffs-Appellants,
Cross-Appellee,

NOT RECOMMENDED FOR
FULL TEXT PUBLICATION

V.

WAKEFIELD PROPERTIES, INC.,
and INDIANHEAD SKI CORPORATION,
Defendants-Appellees,
Cross-Appellants,

and RONALD E. VINCENT,
INDIANHEAD MOUNTAIN RESORT, INC.
Defendants.

On Appeal from the
United States District
Court for the Western
District of Michigan

BEFORE: KENNEDY and NELSON, Circuit Judges; and CONTIE, Senior Circuit Judge.

PER CURIAM. Plaintiffs Ardell Kidwell and R. David Masciola appeal the District Court's grant of summary judgment for defendants Wakefield Properties, Inc. and Indianhead Ski Corporation. Plaintiffs claim that the defendants are liable for ski injuries suffered during a ski race when the plaintiffs, in separate incidents, collided with one of two poles demarcating the finish line. The District Court dismissed the claims on summary judgment holding that, as a matter of law, the claims were barred by the Michigan

Ski Area Safety Act, Mich. Comp. Laws Ann. § 408.321 et seq. The District Court also ruled that the plaintiffs' claims were not barred by the various releases and waivers they had signed prior to the race events. The defendants cross-appeal arguing that the District Court should have found these waivers to be a basis for summary judgment. We find that the summary judgment based on the Michigan Ski Area Safety Act was properly granted and AFFIRM the judgment of the District Court. We do not reach the issues raised by the cross-appeal.

I

The plaintiffs, Ardell Kidwell and David Masciola, were both injured during an alpine ski racing event on March 16, 1986 at the Indianhead Ski Area in Ironwood, Michigan. The plaintiffs, residents of Illinois, were at Indianhead to participate in a weekend of amateur racing. Both plaintiffs were members of clubs associated with the Chicago Metropolitan Ski Council. The plaintiffs were experienced skiers and amateur racers.

The finish line on the hill being used for the races, FIS hill, was marked with two permanently placed poles. Usually the poles supported a banner and the racers would pass between the poles at the end of each race. Directly behind the poles was an electronic light beam which timed the finishes of all the participants. This information was transferred electronically into a trailer which housed the timekeepers.

The injuries of Kidwell and Masciola were caused when they collided with the finish line poles. Masciola lost control when he encountered a compression just before reaching the finish line. While off balance, Masciola hooked his ski on the pole on the right of the finish line, tripped, and suffered a serious injury to his knee. Kidwell lost control when she encountered the same compression, fell, and also skidded into the right pole. Both skiers had skied the hill several times and were aware of the permanently affixed poles.

Plaintiffs filed separate complaints alleging that the defendants were negligent in the operation of Indianhead, in controlling the downhill course, in guarding the poles with fences or by other means, and in failing to warn. Defendants answered the complaint and raised several affirmative defenses including (1) that the defendants are immune from suit under the Michigan Ski Area Safety Act ("Act'), and (2) that the plaintiffs' claims are barred in whole or in part by various waivers and releases signed prior to the race. The trial court consolidated the cases. The defendants filed a motion for summary judgment. The District Court denied the motion on the basis of the releases and waivers but granted the motion under the Act.

II

We review a grant of summary judgment de novo. McKee v. Cutter Laboratories, Inc., 866 F.2d 219, 220 (6th Cir. 1989); Storer Communications, Inc. v National Ass'n of Broadcast Employees & Technicians, 854 F.2d 144, 146 (6th Cir. 1988). Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

The Michigan Ski Area Safety Act, Mich. Comp. Laws Ann. § 408.342(2) provides in part,

> Each person who participates in the sport of skiing accepts the dangers that inhere in that sport insofar as the dangers are obvious and necessary. Those dangers include, but are not limited to, injuries which can result from variations in terrain; surface or subsurface snow or ice conditions; bare spots; rocks, trees, and other forms of natural growth or debris; collisions with ski lift towers and their components, with other skiers. or with properly marked or plainly visible snow-making or snow-grooming equipment.

The District Court found that the compression that caused the plaintiffs' falls was part of the "natural terrain." The court also held that the poles were a "obvious and necessary " danger. The fact that such equipment was not specifically listed in the statute was acceptable under the "including, but not limited to" language. Joint App. at 12.

The Michigan Court of Appeals has decided two cases under the statute. In Grieb v. Alpine Valley Ski Area, Inc., 155 Mich. App. 484, 400 N.W. 2d 653 (1986). the court addressed a case where one skier made a claim based on injuries suffered when he was struck from behind by another skier. The court found that the plaintiff's injury was covered by the language of the statute and was the result of a clear and obvious danger. In a second case, Schmitz v Cannonsburg Skiing Corp., 170 Mich.App. 692, 428 N.W.2d 742 (1988), a skier had died from injuries he received from colliding with a tree growing in the middle of the ski slope. The court affirmed the trial court's grant of a summary judgment motion in favor of the defendants based on the Act. The court held,

> Significantly, the list of "obvious and necessary" risks assumed by a skier under the statute involves those things resulting from natural phenomena, such as snow conditions or the terrain itself; natural obstacles, such as trees and rocks; and types of equipment that are inherent parts of a ski area, such as lift towers and other such structures or snow-making or grooming equipment when properly marked.

170 Mich. App. at 696.

Under the Act, and the interpretation given the Act by the Michigan Court of Appeals, a skier accepts the risk of his or her activity, including collisions with various objects, as long as the danger inherent in those objects is both "obvious and necessary." There is no question that the poles demarcating the finish lines were obvious. They were covered with bright red padding and red

flags stood directly in front of the poles. Both plaintiffs admit noticing the poles during the previous day's skiing. The question of whether the poles were "necessary" is slightly more troubling.[1] Although it is clear that some type of physical object was necessary to mark the finish line, plaintiffs argue that the permanently affixed poles were not necessary and that other means of marking the finish could have been used.

The Act was designed to reduce the liability of ski area operators by making skiers liable for obvious risks of harm from skiing and to encourage skiers to accept responsibility for their safety. Schmitz, 170 Mich. App. at 695. We do not think that the statute intended to place responsibility on the ski area operators to determine which ski equipment is the least risky and to only use that equipment. Such a responsibility would have been parallel to requiring the defendant in Schmitz to have removed the tree from the slope. It would be difficult to argue that a tree in the skier's path was "necessary" for skiing on the slope. This is clearly not the intention of the statute. It was intended to limit the liability of ski resort operators. If a structure serves some purpose or function with respect to skiing and is similar to those listed, it meets the 'necessary' requirement.

As the court in Schmitz found,

> it is logical to construe this section of the statute as an assumption of the risk clause that renders the reasonableness of the skiers' or the ski area operator's behavior irrelevant. By the mere act of skiing, the skier accepts the risk that he may be injured in a manner described in the statute.

170 Mich. App. at 696. In cases where the manner of injury is not specifically mentioned in the Act, the court must look to see whether the danger is similar to those mentioned and thus covered by the "including, but not limited to" language of the statute. In

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[1] One definition, among others, of the word necessary is "of, relating to, or having the character of something that is logically required ...." Webster's 3rd International Dictionary 1510 (16th ed. 1971).

this case, we agree with the District Court that the language of the statute covers the dangers on which the plaintiffs' claims are based and AFFIRM the District Court's grant of summary judgment.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

ARDELL KIDWELL,

Plaintiff,

v. File No. M89-10061 CA
HON. ROBERT HOLMES BELL

WAKEFIELD PROPERTIES, INC., et al.
Defendants.
_____/

ORDER OF DISMISSAL

Defendants, Wakefield Properties, Inc. and Indianhead Ski Corporation, having filed and briefed a Motion for Summary Judgment which Plaintiff responded to; Oral argument having been heard on September 20, 1990 at the conclusion of which this Court GRANTED said motion for the reasons set forth on the record;

NOW THEREFORE said matters are hereby DISMISSED.

Dated: September 26, 1990

/s/Robert Holmes Bell
ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE

FILED
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WESTERN DIST OF MICH
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

R. DAVID MASCIOLA,

Plaintiff,

v. File No. M89-10062 CA
HON. ROBERT HOLMES BELL

WAKEFIELD PROPERTIES, INC., et al.
Defendants.
_____/

ORDER OF DISMISSAL

Defendants, Wakefield Properties, Inc. and Indianhead Ski Corporation, having filed and briefed a Motion for Summary Judgment which Plaintiff responded to; Oral argument having been heard on September 20, 1990 at the conclusion of which this Court GRANTED said motion for the reasons set forth on the record;

NOW THEREFORE said matters are hereby DISMISSED.

Dated: September 26, 1990

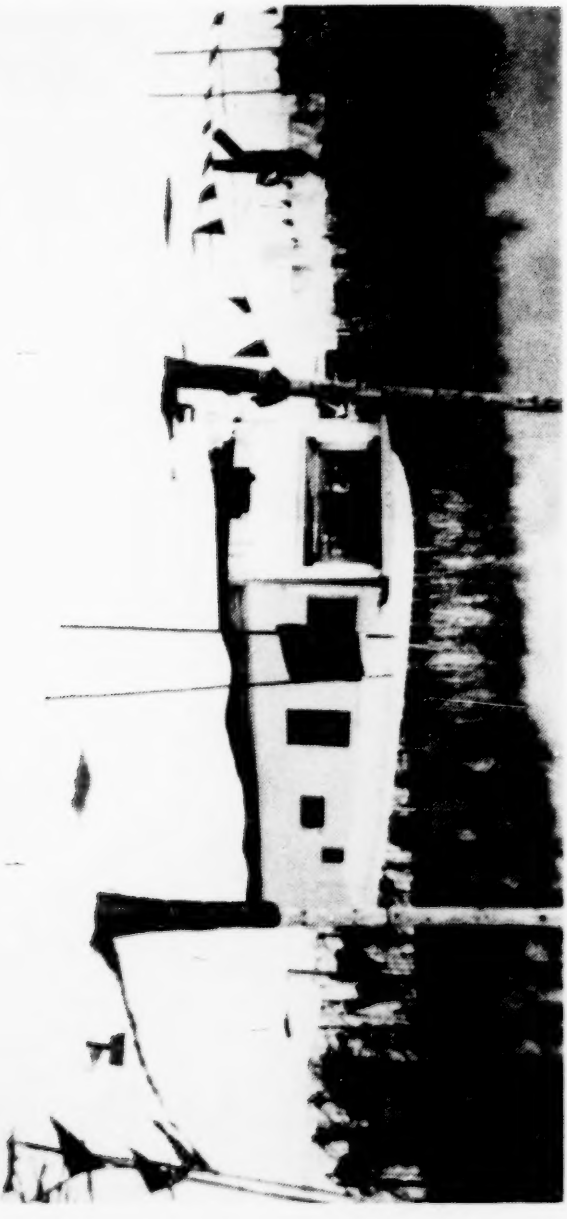
/s/Robert Holmes Bell
ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE

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Petitioners' Exhibit # 1



Petitioners' Exhibit # 2



Petitioners' Exhibit # 3

